Supreme Court, U.S.
FILED
AUG 30 2002
OFFICE OF THE CLERK

No. 02-156

IN THE
Supreme Court of the United States

LIEU B. HOANG,

Petitioner,

v.

JERRY L. UMMEL, MAGISTRATE ALLEN SUPERIOR COURT, SMALL CLAIMS DIVISION, JAMES A. HERMAN, SHERIFF, ALLEN COUNTY SHERIFF'S DEPARTMENT, RUSSELL P. YORK, CHIEF FORT WAYNE POLICE DEPARTMENT, PGPM, INC., JAMESTOWN HOMES, INC., R. SCOTT PERRY, RANDALL L. HOSFORD AND NATIONAL MOVING SYSTEMS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT BRIEF IN OPPOSITION TO WRIT OF CERTIORARI FOR THE RESPONDENTS JAMES A. HERMAN, SHERIFF OF ALLEN COUNTY AND R. SCOTT PERRY

JOHN O. FEIGHNER
Indiana Bar #6800-02
GEORGE SISTEVARIS*
Indiana Bar #13770-02
HALLER & COLVIN, P.C.
444 East Main Street
Fort Wayne, IN 46802
260-426-0444

Counsel for Respondent,
James A. Herman, Sheriff
Allen County Indiana

THOMAS C. EWING*
Indiana Bar #6765-02
HUNT SUEDHOFF KALAMAROS, LLP
803 S. Calhoun Street
900 Courtside Building
Fort Wayne, IN 46802
260-423-1311

Counsel for Respondent,
R. Scott Perry

*Counsel of Record

28 pp

QUESTIONS PRESENTED

1. Whether the *Rooker-Feldman* Doctrine bars Hoang from seeking relief in federal district court on claims which arise from a state court's judgment.

2. Whether Hoang's allegation that the district court judge was biased, which was not raised before the district court, may form the basis for reversal of the district court's decision, and whether evidence of alleged bias, presented for the first time in the court of appeals, was sufficient to support a finding of bias.

3. Whether the actions of James A. Herman, as Sheriff of Allen County, Indiana, or of the deputies of the Allen County Sheriff, were protected by quasi-judicial immunity, where certain unnamed deputies acted pursuant to an official order of a state court.

RULE 29.6 DISCLOSURE STATEMENT

As to Respondent James A. Herman, Sheriff of Allen County Indiana:

James A. Herman is the duly elected Sheriff of the Allen County Police Department, a law enforcement agency (established pursuant to Ind. Code § 36-2-13-1 et seq.), of the County of Allen, State of Indiana, which county is a unit of local government. Ind. Code § 36-2-1-1 et seq.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

RULE 29.6 DISCLOSURE STATEMENT ii

TABLES OF CASES AND OTHER AUTHORITIES v

CITATION TO REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 1

STATEMENT OF THE CASE 3

I. THE *ROOKER-FELDMAN* DOCTRINE BARS HOANG FROM SEEKING RELIEF IN FEDERAL DISTRICT COURT ON CLAIMS WHICH ARISE FROM A STATE COURT'S JUDGMENT. 5

II. HOANG'S ALLEGATIONS OF BIAS AGAINST THE DISTRICT COURT JUDGE WERE NOT PROPERLY PRESERVED FOR ARGUMENT EITHER TO THE DISTRICT COURT OR TO THE COURT OF APPEALS, AND THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE EVIDENCE PRESENTED SHOWED NO BIAS 9

III. HOANG'S ARGUMENT REGARDING THE QUASI-JUDICIAL IMMUNITY OF RESPONDENT JAMES A. HERMAN, SHERIFF OF ALLEN COUNTY, IS WITHOUT MERIT 17

IV. CONCLUSION 20

TABLES OF CASES AND OTHER AUTHORITIES

Cases Page(s)

Ashbrook v. Hoffman, 617 F.2d 474 (7th Cir.1980) 18, 19

Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970) 6

Bartlett v. Stephenson, ___ U.S. ___, 122 S.Ct. 1751, 152 L.Ed.2d 1015, ___ (2002) 8

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988) 7

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) 5, 6

Duba v. McIntyre, 501 F.2d 590 (8th Cir.1974) 18

Garry v. Geils, 82 F.3d 1362 (7th Cir.1996) 6

Henry v. Farmer City State Bank, 808 F.2d 1228 (7th Cir.1986) 18

Hoang v. Jamestown Homes, Inc., 768 N.E.2d 1029 (Ind.Ct.App.2002) *reh'g denied* 8, 20

Hoang v. Ummel, 24 Fed.Appx. 613, 2001 WL 1631716 (7th Cir. 2001) 1

Homola v. McNamara, 59 F.3d 647 (7th Cir.1995) 17

In re Drexel Burnham Lambert Inc., 861 F.2d 1307 (2nd Cir.1988) *reh'g denied*, 869 F.2d 116 (1989), *cert. denied, Milken v. S.E.C.* 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989) 13

Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) 17

Maple Lanes, Inc. v. Messer, 186 F.3d 823 (7th Cir.1999) *cert. denied*, 528 U.S. 1118, 120 S.Ct. 939, 145 L.Ed.2d 817 7

Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) 7

Patmon v. Michigan Supreme Court, 224 F.3d 504 (6thCir.2000) *reh'g and suggestion for reh'g en banc denied* 6

Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923) 5

Taylor v. O'Grady, 888 F.2d 1189 (7th Cir.1989) 13

U. S. v. Nacrelli, 543 F.Supp. 798, 800 (E.D.Pa.1982) 15

U.S. v. Barrett, 111 F.3d 947 (D.C.Cir.1997) 14

U.S. v. Bosch, 951 F.2d 1546 (9th Cir.1991), *cert. denied* 112 S.Ct. 2975, 504 U.S. 989, 119 L.Ed.2d 594 15

U.S. v. Brown, 539 F.2d 467 (5th Cir.1976) 14

U.S. v. Garrudo, 869 F.Supp. 1574 (S.D.Fla. 1994), *aff'd, U.S. v. Cerceda*, 139 F.3d 847 (11th Cir.1998), *reh'g granted and vacated*, 161 F.3d 652, *and on reh'g* 172 F.3d 806 (1999), *cert. denied DeLa Mata v. U.S.*, 528 U.S.985, 120 S.Ct. 444, 145 L.Ed.2d 362 (1999) 13

U.S. v. Hines, 696 F.2d 722 (10th Cir.1982) 15

U.S. v. Mathison, 157 F.3d 541 (8th Cir.1998) 14

U.S. v. Ruzzano, 247 F.3d 688 (7th Cir.2001) 13, 14

U.S. v. Troxell, 887 F.2d 830 (7th Cir.1989) 14

Waits v. McGowan, 516 F.2d 203 (3d Cir.1975) 18

Statutes

Ind. Code § 36-2-1-1 ii

Ind. Code § 36-2-13-1 ii

28 U.S.C. § 1254. 1

28 U.S.C. § 2283 ..... 2, 6

28 U.S.C. § 455 ..... 2, 12, 13

28 U.S.C. § 455(a) 2, 3, 12-15

28 U.S.C. § 455(b) 3, 15

28 U.S.C. § 455(b)(1) 15

42 U.S.C. § 1983 3

Rules

Rule 15.3 of the Rules of the Supreme Court of the United States 1

U.S.Sup.Ct.Rule 10 ..... 8, 15

CITATION TO REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

This case was decided below by an unpublished and unreported order of the United States District Court, Northern District of Indiana, Fort Wayne Division, dated December 17, 2001. The full text of the order is included in the Appendix to Petitioner's Petition for Writ of Certiorari, at pp. A-6 to A-22.

The United States Court of Appeals for the Seventh Circuit entered its Order on the appeal on December 17, 2001, in an unpublished opinion. The full text of that order is included in the Appendix to Petitioners Petition for Certiorari, at pp. A-1 to A-5. It is reported as an unpublished opinion in *Hoang v. Ummel,* 24 Fed.Appx. 613, 2001 WL 1631716 (7th Cir. 2001).

BASIS FOR JURISDICTION

This Court has jurisdiction to consider opinions of the Seventh Circuit Court of Appeals upon the filing of a writ of certiorari pursuant to 28 U.S.C. § 1254. Petitioner's Petition for Writ of Certiorari was placed on the docket on August 1, 2002. Under Rule 15.3 of the Rules of the Supreme Court of the United States, Respondents, if they so choose to respond, must file briefs in opposition by August 31,2002.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the relevant constitutional provisions and statutes which Petitioner sets forth in his Petition for Certiorari, Pet. pp. 1-5, the Respondents submit that the following additional statutes are involved in this matter.

28 U.S.C. § 2283. *Stay of State court proceedings.*

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Also, the full text of 28 U.S.C. § 455 (a), (b)(1) and (b)(2) are set forth as follows:

28 U.S.C. § 455. *Disqualification of justice, judge, or magistrate judge*

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

STATEMENT OF THE CASE

Petitioner seeks to invalidate an unpublished order of the Seventh Circuit which found that the federal courts lack jurisdiction over his 42 U.S.C. § 1983 claim against the several Respondents. The Seventh Circuit upheld the order of the district court and found that Petitioner was seeking review of a state court decision, and under the *Rooker-Feldman* doctrine the federal courts did not have jurisdiction over issues inextricably intertwined with the state court case. Petitioner presents no compelling reason for the Supreme Court to grant certiorari on a precedent well established in this Court.

Petitioner also challenges the Seventh Circuit's decision denying his request to have the district court judge disqualified pursuant to 28 U.S.C. § 455(a) and (b). Petitioner raised the issue for the first time with his appeal of the district court's ruling. The Seventh Circuit gave due consideration to his request and found that exceptional circumstances did not exist to grant a recusal in this case. Although the Petitioner alleges that there is a conflict between the circuits, Respondents submit that the Seventh Circuit's treatment of this issue provides a mechanism for relief under §455, and that no genuine conflict exists. Petitioner offers no compelling reason for the Supreme Court to grant Certiorari on this issue.

Finally, Petitioner challenges the finding of the Seventh Circuit on the issue of the quasi-judicial immunity of law enforcement officers who enforce valid orders of a state court. Although this ruling is not controlling of the Seventh Circuit's order, it also presents no compelling issues or conflicts which require review.

ARGUMENT OF THE RESPONDENTS

I.

THE *ROOKER-FELDMAN* DOCTRINE BARS HOANG FROM SEEKING RELIEF IN FEDERAL DISTRICT COURT ON CLAIMS WHICH ARISE FROM A STATE COURT'S JUDGMENT.

The district court and the Court of Appeals in the instant case each found that *Rooker-Feldman* barred Hoang from having his claim considered in the federal courts. Pet.App. A-4, A-17. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). "If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do." *Feldman* 460 U.S. at 483 n.16, 103 S.Ct. at 1316. Hoang argues that *Rooker-Feldman* has no application in his case.

Hoang contends in his Petition for Writ of Certiorari that his personal property was removed "without due process or a state court order" and that this happened independently from a state court judgment, and thus, was not inextricably intertwined with a state court judgment. Pet. pp. 23-25. The facts of the case do not support this allegation. Hoang's property was removed upon an eviction order of the state court, and the eviction order is precisely what prompted Hoang to seek injunctive relief in federal court. As the district court pointed out in its Order dismissing the case, "Hoang also filed on [May 8, 2001] a '(Temporary) Motion to Stay the State Court's Order' in which he 'respectfully moves the Court to

issue an order to stay state court's order of possession until further order of this court.'" Pet.App. A-7. The district court refused to overturn or stop the state court eviction order, finding that "under even the most liberal standards Hoang's complaint stated no claim upon which relief could be granted. The court further noted that to the extent Hoang was attempting to overturn or stop a state court eviction proceeding, the *Rooker-Feldman* doctrine would bar Hoang's request." *Id.* at A-7, A-8.

Hoang argues, without citation to any authority in support, that *Rooker-Feldman* does not apply to injunctive relief. Pet. p. 25. The decisions from the circuits do not agree with this overly broad assessment. *See Patmon v. Michigan Supreme Court* 224 F.3d 504, 510 (6thCir.2000), *reh'g and suggestion for reh'g en banc denied* (finding that plaintiff's request for injunction and monetary damages required district court to review a prior state judicial determination, thus district court correctly determined that it lacked subject matter jurisdiction); *Garry v. Geils*, 82 F.3d 1362, 1370 (7th Cir.1996) (holding that the application of *Rooker-Feldman* applies to both damages and injunctive relief).

Attempts by Hoang to require the district court to enjoin enforcement of a State court order, or to otherwise stay proceedings, also run afoul of the Anti-Injunction Act, 28 U.S.C. § 2283, which states that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." This Court considered the issue in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970).

> [S]ince the statutory prohibition against such injunctions in part rests on the fundamental

> constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.

Id. 398 U.S. at 287, 90 S.Ct. at 1743. *See also Mitchum v. Foster,* 407 U.S. 225, 233-38, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972) (discussing the exceptions). As to Hoang's case, no exception applies. First, there is no statute that particularly authorizes the federal courts to issue injunctions in the circumstances of this case. Second, the injunction could not have been used in aid of the district court's jurisdiction because the district court found that it lacked jurisdiction over all claims. Third, the final exception,"was designed to permit a federal court to prevent litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well recognized concepts of res judicata and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). Hoang presents no argument to support an assertion that the district court could exercise the power to grant injunctive relief in his case. Hoang's request for injunctive relief in federal court was appropriately denied.

Hoang's argument that the consequences flowing from the eviction proceeding were independent of the eviction, and, therefore, not subject to Rooker-Feldman, is also unavailing. A plaintiff may not circumvent the *Rooker-Feldman* doctrine simply by casting his complaint in the form of a federal civil rights action. *Maple Lanes, Inc. v. Messer,* 186 F.3d 823, 825 (7th Cir.1999), *cert. denied,* 528 U.S. 1118, 120 S.Ct. 939, 145 L.Ed.2d 817. Hoang's civil rights claim arises from the same facts as the eviction action, and the district court was right to decline

to accept jurisdiction of the case. Indeed, Hoang continues to avail himself of his right to review and appeal to Indiana's Court of Appeals, of the state court's alleged wrongful eviction and damages arising as a consequence. On May 31, 2002, the Indiana Court of Appeals further addressed Mr. Hoang's case. In *Hoang v. Jamestown Homes, Inc.*, 768 N.E.2d 1029 (Ind.Ct.App.2002), *reh'g denied*, the Court of Appeals found that (1) the small claims court had jurisdiction over the ejectment action (2) bifurcation of the proceedings for possession of his unit from proceedings on Hoang's counterclaim for damages was proper, and (3) Hoang violated his occupancy agreement when he refused to allow employees of the cooperative corporation to enter and inspect the unit. *Id.* at 1030-1040.

Hoang presents no authority which conflicts with the Seventh Circuit's application of *Rooker-Feldman*. Additional support for the application of *Rooker-Feldman* in this case is also found in the Anti- Injunction Act. Hoang also presents no compelling reason for this Court to exercise its supervisory. power over the Seventh Circuit, as required by U.S.Sup.Ct.Rule 10, under this Court's power to grant certiorari on this issue. An issue "which has few if any ramifications beyond the instant case does not satisfy any of the criteria for the exercise of this Court's discretionary jurisdiction. See this Court's Rule 10." *Bartlett v. Stephenson*, ___ U.S. ___, 122 S.Ct. 1751, 1753, 152 L.Ed.2d 1015 (2002). Rule 10 states specifically that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Hoang presents no tangible argument to support certiorari on the issue of the Seventh Circuit's application of the *Rooker-Feldman* doctrine.

II.

HOANG'S ALLEGATIONS OF BIAS AGAINST THE DISTRICT COURT JUDGE WERE NOT PROPERLY PRESERVED FOR ARGUMENT EITHER TO THE DISTRICT COURT OR TO THE COURT OF APPEALS, AND THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE EVIDENCE PRESENTED SHOWED NO BIAS.

A. The Allegations.

Hoang's allegation of bias on the part of the district court judge was not asserted until the filing of his appeal with the Seventh Circuit Court of Appeals, and Hoang again presents these allegations, along with additional allegations, in his Petition for Writ of Certiorari. With regard to the specific allegations of bias, Hoang ignores the need to present or authenticate evidence, with the bulk of his allegations being in the form of representations by Hoang himself of perceived bias by the judge.

Hoang spins a very fanciful tale in an effort to support such a serious allegation. The district judge who presided over Mr. Hoang's case in the United States District Court for the Northern District of Indiana, Fort Wayne Division, was William C. Lee, the Chief Judge of the Northern District. In his Petition, Hoang reiterates several "conflicts of interest" previously presented to the Seventh Circuit, which he claims require the disqualification of Judge Lee. Hoang also submits new allegations which are presented for the first time in his Petition for Certiorari. These alleged conflicts are restated here and are addressed in *seriatim*.

1. ***Alleged Conflict due to Judge Lee's former association with a law firm.*** Hoang claims that a

conflict of interest exists as a result of Judge Lee's former association and partnership in the law firm of Hunt, Seudhoff, Borror, Eilbacher & Lee. That law firm is now known as Hunt Seudhoff Kalamaros, LLP, and it was the law firm of record for two of the named defendants: R. Scott Perry and National Moving Systems, Inc. Hoang claims that Judge Lee "has still drawn a salary after leaving the law firm." Although this statement seems to imply that the Judge may still be receiving benefits from the firm, Hoang's only reference to support his claim is to a newspaper article appearing in a Fort Wayne Newspaper in June of 1982. The article was never placed in the record before the district court, and was first presented to the Court of Appeals during the briefing stage of Hoang's appeal.

The newspaper article, which is over 20 years old, makes reference to the relative incomes of the judges of the Northern District of Indiana. The article also references payments to Judge Lee by his former law firm for an apparent buy-out of his interest in the firm. The article reports that he would be receiving payments through 1983. There is therefore no indication that Judge Lee has received any payments or benefits from his former law firm for over 18 years.

Hoang also claims that prior to the time Judge Lee left his law firm to assume the district court bench in August of 1981, his law firm represented Jamestown (presumably, the respondent, Jamestown Homes, Inc.). Again, Hoang offers no tangible proof to support his claim. However, he does seem to suggest a connection through an insurance company. "[W]hen Judge Lee was a partner with 'Hunt, Suedhoff, Borror, Eilbacher & Lee', his law firm represented Jamestown through its insurance company." Pet. p.6.

Although this tenuous connection between the judge and one of the respondents may or may not have existed more

than 20 years ago, given the record presented, one can only speculate as to the facts which support the allegation. No Court should be required to do so.

2. ***Alleged Conflict due to Judge Lee's alleged ownership interest in apartment complex.*** Hoang next attacks Judge Lee's former ownership in an apartment complex which is not a party to this case. Hoang alleges, without documentation or admissible evidence, that Judge Lee once had an ownership interest in Brentwood Apartments, and that the law firm of Haller & Colvin, P.C., which represents the respondent, James A. Herman, Sheriff of Allen County, also represented the apartment complex in small claims matters before the respondent, Jerry L. Ummel, Magistrate, Allen Superior Court, Small Claims Division. Hoang submits no specific dates when Judge Lee might have had an ownership interest in these apartments, he submits no particular cases or dates when Haller & Colvin might have appeared before the magistrate on behalf of this apartment complex, and he does not allege that Brentwood Apartments is affiliated in any way with any of the parties in the instant case. He does not allege that Judge Lee has a financial interest in the outcome of the proceedings in the instant case as a result of a former alleged interest in Brentwood apartments, or otherwise.

3. ***New Allegations of Judicial Improprieties in Petition for Certiorari.*** Hoang goes on to engage in a further attack of Judge Lee in his Petition for Certiorari, where for the first time, Hoang suggests that while his case was pending before the Court of Appeals, Judge Lee interposed his influence upon the Seventh Circuit Judges to rule against Hoang. Hoang claims that he obtained information from the "Seventh Circuit's Deputy Clerk" that on December 13, 2001, Judge Lee "called one of the three assigned Circuit Judges to explain his side of the 'conflicts of interest.' And so, on the next day of Friday, December 14, 2000, this case

was immediately submitted to said three Circuit Judges who hastily affirmed Chief Judge Lee's decision on the following working day of Monday, December 17, 2001." Pet. p. 23. Hoang also engages in unsupported allegations that the district judge took "kickbacks" in a criminal matter. Pet. p. 21, n.44. Respondents submit that these unsupported and scurrilous accusations have no place in a Petition for Certiorari to the Supreme Court, and without a proper foundation or supporting evidence, should be stricken or disregarded.

Hoang mistakenly argues that under the findings of the Seventh Circuit, "the District Judge is not required to disclose his or her conflict of interest, bias and prejudice against a party... but the party is required to discover the District Judge's conflict of interest, bias and prejudice." Pet. p. 19. There is no such finding by the Seventh Circuit in this case. Indeed, the Court of Appeals considered Hoang's request for relief under both 28 U.S.C. §455(a) and 28 U.S.C. §455(b).[1] The Court found that Hoang's request for the Judge's recusal was not supported under either section. Pet.App. pp. A-4, A-5.

---

[1]28 U.S.C. § 455 (a) and (b)(2) read as follows:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

* * *

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it. . . .

B. Requirements for recusal under 28 U.S.C. § 455.

Contrary to Hoang's assertions, the Seventh Circuit followed the long established precedent that a judge's recusal under § 455 is self -executing and the judge is obligated to recuse himself *sua sponte* under the stated circumstances. *Taylor v. O'Grady*, 888 F.2d 1189, 1200, 1201 (7th Cir.1989). A judge is under a self-enforcing obligation to recuse himself where legal grounds exist for disqualification. The standard to be applied is objective and not subjective. *U.S. v. Garrudo*, 869 F.Supp. 1574 (S.D.Fla. 1994), *aff'd, U.S. v. Cerceda*, 139 F.3d 847 (11th Cir.1998), *reh'g granted and vacated*, 161 F.3d 652, *and on reh'g* 172 F.3d 806 (1999), *cert. denied DeLa Mata v. U.S.*, 528 U.S.985, 120 S.Ct. 444, 145 L.Ed.2d 362 (1999). An interest which is remote, contingent or speculative is not the kind which reasonably brings judge's impartiality into question for disqualification purposes. *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307 (2nd Cir.1988) *reh'g denied*, 869 F.2d 116 (1989), *cert. denied, Milken v. S.E.C.* 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989).

1. ***Application of 28 U.S.C. § 455(a).*** The Court of Appeals took into account Hoang's attempt to raise the issue of conflict of interest for the first time at the appellate level. The Court considered 28 U.S.C. § 455(a) which requires a federal judge to disqualify himself "in any proceedings in which his impartiality might be questioned." The Court found that Hoang waived his right to relief under 28 U.S.C. § 455(a) "because he failed to move for recusal until after the district court dismissed the case." Pet.App. p. A-5. The Court of Appeals relied on *U.S. v. Ruzzano*, 247 F.3d 688 (7th Cir.2001), which outlines the Seventh Circuit's position on the application of § 455(a), and states that a claim can be waived even though the defendant discovered alleged grounds for recusal after being sentenced. *Id.* 247 F.3d at 694.

Hoang attempts to distinguish the application of §455(a) in the Fifth Circuit from its application in the Seventh Circuit. Pet. pp. 19, 20. Respondents submit that the application of §455(a) between the circuits is not in conflict. Hoang is correct when he states that the Fifth Circuit in *U.S. v. Brown*, 539 F.2d 467 (5th Cir.1976) confers upon itself jurisdiction to consider claims of bias under §455(a). However, Respondents do not agree that the Seventh Circuit forever forecloses a §455(a) review if it is not raised in the district court. Indeed, this Court did give Hoang that review, and relied on *Ruzzano* in so doing. Pet. App. p. A-4, A-5. The Seventh Circuit requires the filing of a writ of mandamus to raise § 455(a) recusal challenges, otherwise they are waived, *Id.* 247 F.3d at 694. Other circuits, although not requiring the filing of a writ of mandamus, have also found waiver of § 455(a) in cases where a party fails to preserve this issue at the district court level. *Id.* (*citing U.S. v. Mathison*, 157 F.3d 541, 545-45 (8th Cir.1998); *U.S. v. Barrett*, 111 F.3d 947, 952-53 (D.C.Cir.1997)).

Significantly, the Seventh Circuit has fashioned a safety valve for the exceptional case where waiver would otherwise have barred review. In the instant case, the Seventh Circuit did not end its analysis of § 455(a) after finding waiver. It went on, as it did in *Ruzzano*, to acknowledge that under "exceptional circumstances" an appellant might be excused for failing to timely seek a recusal. The Seventh Circuit found that Hoang had not demonstrated such circumstances. Pet.App. pp. A-4, A-5. The Court of Appeals , in reaching this conclusion, necessarily examined the record in the case and in citing *U.S. v. Troxell*, 887 F.2d 830, 833 (7th Cir.1989), found specifically that "there is no evidence in the record that the alleged grounds for recusal had any effect on Hoang's case or affected his substantial rights in any way." Pet.App. p. A-5. Hoang, in effect, is asking the Supreme Court to review

allegations of bias which are not supported in the record and which did not affect his rights in any way.

2. *Application of 28 U.S.C. § 455(b).* The Seventh Circuit also acknowledged that Hoang raised a § 455(b) claim for the first time on appeal. Pet.App. p. A-5. Hoang's § 455(b) argument is essentially merged with his arguments on § 455 (a). Pet. p. 19-21. However, in a specific reference to §455(b), Hoang argues that as a result of his failure to raise the issues below, the Seventh Circuit found that he waived the right to argue them on appeal. Pet. p. 20. The Seventh Circuit actually found that after considering the allegations made by Hoang, and in applying the §455(b) requirement that there be a showing of "actual interest or bias on the part of the judge," the facts alleged did not require the Judge to recuse himself. Pet. App. p. A-5. See, *U.S. v. Hines*, 696 F.2d 722 (10th Cir.1982) (finding that the recusal of the trial judge was not required under § 455(b)(1) where there was no adequate proof of the trial judge's actual bias or prejudice); *U.S. v. Nacrelli*, 543 F.Supp. 798, 800 (E.D.Pa. 1982) (holding that absent allegation of factual basis to support petitioner's claim that trial judge should have recused himself, it was completely reasonable for judge to preside over the trial); *U.S. v. Bosch*, 951 F.2d 1546, 1549 (9th Cir.1991), *cert. denied*, 504 U.S. 989, 119 L.Ed.2d 594, 112 S.Ct. 2975 (1992) (finding that the failure of appellant to show actual bias, or actual prejudice caused by an alleged bias, precluded relief under §455(a)). The Seventh Circuit's ruling on this issue is entirely consistent with established precedent.

Hoang does not establish that a conflict exists in the circuits sufficient to grant certiorari. Hoang's arguments regarding recusal under both § 455 (a) and (b) were adequately considered by the Seventh Circuit. He simply is not happy with the outcome. Hoang offers no compelling reason as required by Rule 10 to substantiate the granting of certiorari.

III.

HOANG'S ARGUMENT REGARDING THE QUASI-JUDICIAL IMMUNITY OF RESPONDENT JAMES A. HERMAN, SHERIFF OF ALLEN COUNTY, IS WITHOUT MERIT.

In Hoang's final argument in his Petition for Certiorari, he alleges that officers of the Allen County Police Department ("County Sheriff's Deputies") are not entitled to immunity in this case. The Seventh Circuit addresses this issue in a footnote. "While we affirm the district court's dismissal of the entire complaint based on the *Rooker-Feldman* doctrine, we note that the district court was also correct in asserting that . . . the law enforcement officers had qualified immunity for their actions in enforcing the ejectment order, *see Homola v. McNamara*, 59 F.3d 647, 651 (7th Cir.1995)." Pet.App. p. A-4. Respondents submit that this finding is not controlling of the case and it is either an alternative ruling or dicta in the Seventh Circuits unpublished opinion.

Since both the district court and the Seventh Circuit correctly ruled that the entire complaint should be dismissed based on the Rooker Feldman doctrine, it is unnecessary for this Court to grant Certiorari to review the immunity issue. Further, Hoang offers no sound basis for review of the decision. Hoang cites only *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) for the proposition that the actions of the County Sheriff's Deputies were "not ministerial acts but clearly violations of established law, e.g. § 1983." Pet.App. p. 30. In *Malley*, this Court ruled that police officers where entitled to qualified immunity and not absolute immunity for causing an unconstitutional arrest by presenting an inappropriate affidavit to a judicial officer in seeking a warrant. *Id.* at 475 U.S. at 345, 106 S.Ct. at 1098. In the instant case, the County Sheriff's Deputies were acting on a judicially

valid eviction order. This action is protected under quasi-judicial immunity, and the district court in the instant case was correct to find sufficient grounds for dismissal of Hoang's claim in that regard.

Support is found in *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir.1986), where the plaintiff alleged that a sheriff violated his civil rights in enforcing a foreclosure judgment. The sheriff in *Henry* allegedly entered the plaintiff's house, seized non-exempt property and later sold that property at a public auction, all pursuant to a circuit court order directing the sheriff to enforce a judgment. *Id.* at 1238. The plaintiff also alleged that the sheriff falsely charged the plaintiff with contempt of court in connection with the refusal to comply with the order. *Id.* The district court dismissed the claim against the sheriff and this dismissal was upheld by the Seventh Circuit, which found as follows:

> Non-judicial officials whose official duties have an integral relationship with the judicial process are entitled to absolute immunity for their quasi-judicial conduct. *Ashbrook v. Hoffman*, 617 F.2d 474, 476 (7th Cir.1980). Although immunity is normally extended to those performing discretionary and not ministerial acts, "those performing ministerial acts under a judge's supervision and intimately related to judicial proceedings have quasi-judicial immunity." *Id.* at 477 n. 4; see *Waits v. McGowan*, 516 F.2d 203, 206 (3d Cir.1975) (official entitled to absolute immunity afforded judge if "he is performing a ministerial function at the direction of the judge"); *Duba v. McIntyre*, 501 F.2d 590, 592 (8th Cir.1974) (quasi-judicial absolute immunity extended to police and other court officers "for purely ministerial acts

> where they do nothing other than perform orders issuing from a court").
>
> Sheriff Massey was at all times acting pursuant to an official court order to enforce a validly entered judgment when he performed the allegedly wrongful acts of which the Henrys now complain. It is difficult to think of a task more intimately related to a judicial proceeding than that of enforcing a money judgment entered by a court. Because the Sheriff was acting in furtherance of his "official duties in aid of the court," *id.* at 477, he is entitled to quasi-judicial absolute immunity from suit for damages arising from those acts.
>
> The proper procedure for a party who wishes to contest the legality of a court order enforcing a judgment is to appeal that order and the underlying judgment, not to sue the official responsible for its execution. See *Ashbrook*, 617 F.2d at 477.

As in this instance, the Henrys did pursue state appeal remedies, and the Seventh Circuit reasoned as follows.

> To allow the Henrys to attack the order collaterally by bringing a § 1983 suit against the Sheriff for damages would require sheriffs and other court officers who enforce properly entered judgments pursuant to facially valid court orders to act as appellate courts, reviewing the validity of both the enforcement orders and the underlying judgments before proceeding to collect on them. Such a result is obviously untenable."

Id. 808 F.2d at 1238.

Hoang's §1983 claim against the Allen County Sheriff or any of the law enforcement officers must fail under the facts presented since all actions were done pursuant to a valid order of eviction, which order has been upheld in Hoang's recent appeal to the Indiana Court of Appeals. *Hoang*, 768 N.E.2d at 1035.[2]

Hoang's claim that the sheriff is not entitled to qualified immunity is unsupported. There exists no sufficient conflict in the jurisdictions on this issue of quasi-judicial immunity, and the ruling of the Seventh Circuit, which amounts to an alternative ruling or dicta, does not evoke a level of departure from usual judicial proceedings necessitating the granting of certiorari.

IV.

CONCLUSION

The petition for writ of certiorari should be denied.

---

[2]In Hoang's Petition, he alleges, *inter alia*, that Sheriff's deputies "broke his furniture and . . . helped themselves with [sic] three (3) boxes of his personal property." Pet. p. 30. Hoang makes no citation to the record of these events, and indeed they were not alleged in the district court. These are additional unsupported accusations which have no place in a Petition for Certiorari to the Supreme Court. Hoang presents no foundation nor supporting evidence, nor any proof that these accusations where ever made in the record, and as such they should not be considered.

Dated this 30th day of August, 2002.

Respectfully submitted,

HALLER & COLVIN, P.C.
444 EAST MAIN STREET
FORT WAYNE, IN 46802
PHONE: (260) 426-0444

HUNT SUEDHOFF
KALAMAROS, LLP
803 S. CALHOUN STREET
9TH FLOOR
FORT WAYNE, IN 46802
PHONE: (260) 423-1311

BY: _____
GEORGE SISTEVARIS
Indiana Bar #13770-02
Counsel of Record

JOHN O. FEIGHNER
Indiana Bar #6800-02

Counsel for Respondent,
James A. Herman, Sheriff
Allen County, Indiana

BY: _____
THOMAS C. EWING
Indiana Bar #6765-02
Counsel of Record

Counsel for Respondent
R. Scott Perry